United States Court of Appeals

FOR THE NINTH CIRCUIT

SHIRLEY MOON,
Appellant,

vs.

ORVILLE FREEMAN, as Secretary of Agriculture, and COMMODITY CREDIT CORPORATION,
Appellees.

No. 21008

Appeal from a judgment of the United States District Court for the Eastern District of Washington, Northern Division

HONORABLE CHARLES L. POWELL, *Judge*

BRIEF OF APPELLANT

FRANCIS CONKLIN, S. J.
AND
WESLEY A. NUXOLL
South 214 Main Street
Colfax, Washington
Attorneys for Appellant

KERSHAW'S, INC.

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHIRLEY MOON,
Appellant,

vs.

ORVILLE FREEMAN, as Secretary of Agriculture, and COMMODITY CREDIT CORPORATION,
Appellees.

No. 21008

Appeal from a judgment of the United States District Court for the Eastern District of Washington, Northern Division

HONORABLE CHARLES L. POWELL, *Judge*

BRIEF OF APPELLANT

FRANCIS CONKLIN, S. J.
AND
WESLEY A. NUXOLL
South 214 Main Street
Colfax, Washington
Attorneys for Appellant

KERSHAW S, INC.

INDEX

CASES

TEXTS

STATUTES

REGULATIONS

CONSTITUTIONAL PROVISIONS

CONGRESSIONAL RECORD

United States Court of Appeals
FOR THE NINTH CIRCUIT

SHIRLEY MOON,
Appellant,

vs.

ORVILLE FREEMAN, as Secretary of Agriculture, and COMMODITY CREDIT CORPORATION,
Appellees.

No. 21008

Appeal from a judgment of the United States District Court for the Eastern District of Washington, Northern Division

HONORABLE CHARLES L. POWELL, *Judge*

BRIEF OF APPELLANT

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The cause is before the Court on an Amended Complaint wherein Shirley Moon, a citizen of the United States and a resident of the Eastern District of the State of Washington is Appellant and Orville Freeman, as Secretary of Agriculture, and Commodity Credit Corporation are Appellees.

The constitutionality of provisions of the Agricultural Adjustment Act of 1964, which amended the Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 et seq.) is in question.

The specific provisions of the Agricultural Adjustment Act of 1964 which are involved are as follows:

> ". . . The Secretary shall, in accordance with such regulation as he may prescribe, provide for the issuance of domestic marketing certificates for the portion of the wheat marketing allocation representing wheat used for food products for consumption in the United States and for the issuance of export marketing certificates for the portion of the wheat marketing allocation used for exports." 7 U.S.C. 1379c (a) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II, sec 202 (12) - (14), 78 Stat. 180);

and

> ". . . The Secretary shall determine and proclaim for each marketing year the face value per bushel of wheat marketing certificate. . . ." 7 U.S.C. 1379c (c) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II, sec 202 (12) - (14), 78 Stat. 181);

and

> ". . . During any marketing year for which a wheat marketing program is in effect, . . . all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported." 7 U.S.C. 1379d (b) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II, sec 202 (15) - (17), 78 Stat. 181).

Appellant, a non-complying producer and exporter, was required to purchase export marketing certificates

from the Commodity Credit Corporation and seeks to recover the sum so paid.

Appellant asserts that the above quoted portions of the 1964 Amendment to the Agricultural Adjustment Act of 1938 are unconstitutional for the reason that the export marketing certificate provisions constitute a "tax or duty" on exports and as such violate Article I, Section 9, clause 5 of the Federal Constitution, which provides as follows:

> "No tax or duty shall be laid on articles exported from any state."

Jurisdiction in the District Court of the Eastern District of Washington is based upon 28 U.S.C. 1346a (2), 28 U.S.C. 1337 and 15 U.S.C. 714b (c).

Jurisdiction in the Circuit Court of Appeals in the Ninth Circuit is based upon 28 U.S.C. 1291.

The pleadings sustaining the jurisdiction are the Complaint (Tr. pps. 1 - 6), the amended Complaint (Tr. pps. 61 - 66) and the stipulated facts (Tr. pps. 10 - 39).

STATEMENT OF THE CASE

This cause is before the Court on stipulated facts (Tr. 10 - 13). All references to facts are within the body of that stipulation.

The Appellant, a citizen of the United States, was a wheat farmer, residing in the Eastern District of the United States District Court in the State of Washington. The Appellee, ORVILLE FREEMAN, was the Secretary of Agriculture and the Appellee, COM-

MODITY CREDIT CORPORATION was a separate Corporation acting as the agent of ORVILLE FREEMAN for administration of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1281 et seq), hereinafter referred to as the Act, as it related to an Export Marketing Certificate program.

The Act, subsequent to the institution of the present suit was amended in part. The portion of the Act involved under the 1964 amendment are 7 U.S.C. 1379b (Pub. L. 88-297, Title II, sec 202 (10), 78 Stat. 179); 7 U.S.C. 1379c (Pub. L. 88-297, Title II, sec 202 (12)-(14), 78 Stat. 180, 181); and 7 U.S.C. 1379d (Pub. L. 88-279, Title II, sec 202 (15) - (17), 78 Stat. 181, 182). All references to the Act relate to its form and substance as existing after the 1964 amendment.

Pursuant to Sections 1379b and c of the Act the Appellees did make and promulgate regulations implementing such Act as it related to the Export Marketing Certificate Program. The regulations are a part of the Stipulation (Tr. 14-39).

The Act, provides that during any marketing year for which a certificate program is in effect all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported, (7 U.S.C. 1379d (b) (ii)). Only wheat exported for non-commercial purposes and donation are excepted from this requirement. Under the 1964 program, the Secretary of Agriculture determined the face value per bushel of export certificates to be twenty-five (25c) cents per bushel, the amount as required by the Act, (7 U.S.C. 1379c (c)) by

which the level of price support for wheat accompanied by export certificates ($1.55) exceeded the level of price support for non-certfiicate wheat ($1.30). The Act provides that:

> "In order to expand international trade in wheat and wheat flour and promote equitable and stable prices therefor the Commodity Credit Corporation shall, upon the exportation from the United States of any wheat or wheat flour, make a refund to the exporter or allow him a credit against the amount payable by him for marketing certificates in such amount as the Secretary determines will make United States wheat and wheat flour generally competitive in the world market, avoid disruption of world market prices, and fulfill the international obligations of the United States." (7 U.S.C. 1379d (b).)

The amount of this refund may vary day to day.

A producer who, in 1964, diverted a specified acreage of crop land on his farm from the production of wheat to an approved conservation use, and complied with other requirements, was eligible for domestic and export certificates on his wheat acreage. (7 U.S.C. 1379c). Such a producer received domestic certificates for Fifty percentum (50%) of his farm wheat marketing allocation and export certificates for the remaining portion of the farm wheat marketing allocation devoted to wheat. The farm wheat marketing allocation is the number of bushels obtained by multiplying the normal yield by the farm acreage allotment and multiplying the resulting number of bushels by the national allocation percentage. (7 U.S.C. 1379c, Section 728.101-.103 of the Farm Wheat Certificate Program Regulations 29 F.R. 5510 (April 24, 1964), as

amended in 29 F.R. 13635 (October 6, 1964).) For 1964, the national allocation percentage was Ninety (90). Therefore, an eligible producer was given export marketing certificates on Forty-five (45) percentum of his normal yield. The Commodity Credit Corporation purchased such certificates from the producers and in turn sold the certificates to the exporters. (7 U.S.C. 1379(e)).

A producer who, in 1964, did not divert acreage from the production of wheat and comply with the other requirements specified in the Act was not eligible for export marketing certificates on any portion of his crop of wheat. (7 U.S.C. 1379c (b)).

The total wheat crop estimated to be exported in the 1964-65 marketing year was 675,000,000 bushels. The total wheat produced in 1964 was approximately 1.29 billion bushels.

The appellant did not elect to comply with the Act and was thus ineligible as a producer to receive export marketing certificates for the wheat production on his farm.

The Appellant, on January 15, 1965, contracted to sell in export wheat harvested after July 1, 1964, and exported the same to Rotterdam, The Netherlands, on or about January 26, 1965. The wheat exported did not fall within any of the exemption from the requirements of the Export Wheat Marketing Certificate Program.

The Appellant filed Form CCC-518, Report of Wheat Exported, as required by the regulations. On such form, the Appellant reported the export of

1872.4 bushels of wheat, computed his export certificate liability at Four Hundred Eleven and 93/100ths ($411.93) Dollars, computed a refund for which he was eligible at Two Hundred Forty-three and 41/100ths ($243.41) Dollars, and paid the balance of One Hundred Sixty-eight and 52/100ths ($168.52) Dollars. In this action he seeks a recovery of the One Hundred Sixty-eight and 52/100ths ($168.52) Dollars.

The Appellant was both a producer and an exporter of wheat within the meaning of the Act.

In this action, Appellant alleges that the requirement in 7 U.S.C. 1379d (b), that he purchase marketing certificates on wheat exported is a tax or duty on exports in violation of the provisions of Article I, Section 9, Clause 5 of the Constitution of the United States which states,

> "No tax or duty shall be laid on articles exported from any State."

The Appellant and Respondents respectively moved for Summary Judgment (Tr. 40-55 and 56). The District Court granted Appellees Motion and denied Appellants Motion. (Tr. 81).

SPECIFICATION OF ERRORS

The District Court erred in determining that the "Export Marketing Certificate" provisions of the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. Sec. 1281 (Secs. 1379b, 1379c and 1379d) et seq. (1964) does not constitute a "tax or duty on exports"

in contravention of Article I, Section 9, Clause 5 of the Constitution of the United States of America (Tr. 76-80) and thereby erred in entering its order granting Appellee's Motion for Summary Judgment. (Tr. 81)

OUTLINE OF ARGUMENT

Appellant's argument revolves upon the proposition that Article I, Section 9, Clause 5 of the Federal Constitution, which prohibits the imposition of a tax or duty on exports, restricts the power granted to Congress to regulate foreign Commerce in Article I, Section 8, Clause 3. The restriction operates upon Congress whether the Act challenged constitutes a revenue raising device or is designed as a regulation if, in fact, the challenged legislation imposes an economic burden upon the process of export, whether upon the article exported or the exporter.

The portion of the Act challenged in this case (7 U.S.C. 1379 a-e (1964), imposes an economic burden upon the process of export in the form of a twenty-five cent (25c) per bushel charge to be paid by the exporter for each bushel of wheat exported. The sum charged is payable to the Commodity Credit Corporation and is subject to reduction only in such amount (if any) as the Secretary of Agriculture determines shall be necessary to make United States Wheat competitive in the world market. As such the Act imposed an economic burden upon the Appellant in the sum of $168.52.

LEGISLATIVE HISTORY

The Act in question originated in the Senate and passed the Senate after having been referred to the Committee on Agriculture and Forestry. The Act thereafter was passed by the House of Representatives after being handled by the Agriculture Committee. The matter of constitutionality and potential violation of Article I, Section 9, Clause 5 as a tax or duty on exports was raised directly by Representative Thomas Curtis (Missouri) who urged that the matter should be referred to the Ways and Means Committee as revenue legislation. (Volume 110, Cong. Rec. 88th Cong. 2nd Session, p. 6132 March 24, 1964). The only response to the remarks of Mr. Curtis are those of Representative Carl Albert (Oklahoma) (110 Cong. Rec., 88th Cong. 2nd Session, p. 7309, April 8, 1964). The enactment became effective April 11, 1964.

CONSTITUTIONAL HISTORY

Article I, Section 9, Clause 5 of the Federal Constitution provides as follows:

> "No tax or duty shall be laid on articles exported from any State."

Constitutional History shows that the purpose of this clause was to serve as a limitation on the power of Congress to regulate foreign commerce, as well as to serve as a limitation on the general power of Congress to raise revenue.

The idea of a restriction on the imposition of a tax or duty on exports appeared in an early draft of the Committee on Detail in two areas: The first provided

that among the legislative powers should be the power to raise revenue by taxation, except that no tax should be imposed on exports (*Farrand,* The Records of the Federal Convention, Vol. II, p. 142); and, secondly as an exception to the power to regulate commerce it was provided that there should be no duty on exports (*Farrand,* supra, page 143).

Among Mr. Wilson's (of Pennsylvania) papers the draft in the Committee on Detail showed language that:

> "No tax or duty shall be laid by the Legislature on articles exported from any State; . . ." (*Farrand,* supra, pps. 168, 169.)

This language was the language of the draft reported out of the Committee on Detail on August 6, 1787. (*Farrand,* supra, p. 183.) The Committee on Style modified the language to its present form by eliminating the words "by the legislature." (*Farrand,* supra, p. 596.)

The proponents of the clause were concerned not only with the question of revenue but asserted a need for a definite restriction on the power of Congress to interfere with or regulate commerce involving exports. The Southern States, which were the exporting States, wanted protection for their export trade and asserted that the power to impose a tax or duty on an export could give the Federal Government the power to wholly dominate, and ruin if it sought, the business of a particular commercial locale. (*Farrand,* supra, pps. 305-308, 359, 365.) The urgency of the feeling of some members of the Southern delegations to provide

a restriction relating to taxation of exports, is reflected by their attempt to directly couple this restriction to the clause granting the general power of taxation to Congress. These members did not wish to risk granting the general power to tax without immediately, in the same Article, restricting its use on exports. (*Farrand,* supra, p. 305.)

When the prohibition against taxation or imposition of duties on exports came on for general debate in the Convention, the sweeping effect of the Article as intended by the Framers is illustrated by not only the debate (*Farrand,* supra, pps. 359-365) but by several attempts made to modify its structure.

The opponents of this Section, including James Madison, argued that the power to regulate exports, through a tax, was a necessary national power for a variety of purposes, including the necessity for:

> "Procuring equitable regulations from other nations" (*Farrand,* supra, p. 361).

Mr. Wilson stated that to pass favorably upon the prohibition of taxing exports:

> "Is to take from the Common Government half the regulation of trade." (*Farrand,* supra, p. 362.)

> "It was his (Mr. Wilson's) opinion that a power over exports might be more effectual than that over imports in obtaining beneficial treaties of commerce." (*Farrand,* supra, p. 362.)

In order that the power to regulate the export trade might be retained with the Central Government two amendments were proposed to the draft of the Committee on Detail.

(1) Mr. Clymer (of Pennsylvania) moved that the words "for the purpose of revenue" be inserted after the word "duty" in the draft. His stated purpose in moving for this amendment was that the taxation of exports for the regulation of trade should be permissible. (*Farrand,* supra, p. 363.) The attempted amendment was defeated. (*Farrand,* supra, p. 363.)

(2) Mr. Madison (as a lesser evil than a total prohibition of a tax or duty on exports) moved to amend the clause by inserting after it the words "unless by consent of two-thirds of the legislature." This attempted amendment also failed. (*Farrand,* supra, p. 363.)

The proponents of the prohibition of imposition of taxes or duties on exports set forth a variety of reasons for seeking to prevent this power from being placed in the hands of the Federal Government. Among these arguments was one which might be appropriate in this case, i.e.:

> "It might be made use of to compel the States to comply with the will of the General Government, and to grant it any new powers which might be demanded . . ." (*Farrand,* supra, p. 363).

It appears that the States were jealous of their export markets during the full course of the Convention and that it was the intent of the Convention that the Congress be restrained from in any way interfering with access of the citizens of the several States to foreign markets. The prohibition against a tax or duty on exports then, it would reasonably seem, prohibits not only the raising of revenue through this source, but also any attempt to regulate foreign or domestic markets through this same device.

James Madison (who professed a need for a power to lay duties and tax exports in order that the Central Government could adequately regulate trade) in his notes on the Constitutional Convention shows discussion of this precise question by numerous members of the convention and illustrates the determination of the convention that the clause in question prohibited the laying of taxes or duties either for purposes of revenue or for purposes of regulation. *Madison* "Journal of the Constitutional Convention" Vol. II, pps. 572-576. Madison in his notes, reflected his feelings for the need of a power to lay taxes or duties saying:

> ". . . A proper regulation of exports may, and probably will, be necessary hereafter and for the same purposes as the regulation of imports, viz, for revenues, domestic manufactures and procuring equitable regulations from other nations." *Madison* 'Journal of the Constitutional Convention' Vol. II, p. 574.

The Constitutional Convention, as reflected above, defined the breadth of the clause in question by stating that a tax or duty on exports should not be used for either revenue raising or regulatory purposes. This question was placed squarely before the Convention as set forth previously in this brief (*Farrand,* supra, p. 363). We can give significance to the action of the Convention in defeating attempted amendments to the clause in question only by interpreting that clause as constituting not merely a limitation on the powers of taxation, but also a limitation on the power of Congress to regulate foreign commerce under Article I, Section 8, Clause 3. This has been the interpretation in the past.

TAX OR DUTY

The terms "tax or duty" are illustrative of the broad prohibition intended by the Framers of the Constitution. A question as to the precise meaning of each word was raised in the Convention (*Farrand,* The Records of the Federal Convention, Vol. II, p. 305) but was not answered. The terms "tax or duty" are, however, separate and distinct, and both are prohibited.

The term duty entails commercial useage and seemingly is identified as a system for commercial regulation.

University of Illinois v. U.S. (1933) 289 U.S. 48, 77 L.Ed. 1025, 53 S. Ct. 509 speaks of duties as being a "regulatory device" as well as a "taxing device."

Mr. Storey in Commentaries on the Constitution Vol. II, sec. 1088 (1873) speaks of duties as a common means of exercising the power to regulate commerce.

Pollock v. Farmers Loan & Trust Co. 39 L. Ed. 1108, 15 S. Ct. 912, 158 U.S. 601 (1895) speaks of "duties" in antithesis to direct "taxes" and cites the writings of Mr. Hamilton as contradistinguishing duties from taxes; which generally speaking are considered as revenue raising devices for the regular support of government.

> "In its most usual signification this word (duty) is the synonym of imposts or customs; but it is sometimes used in a broader sense as including all manners of taxes, charges or governmental impositions." Blacks Law Dictionary, Third Edition, page 631.

The term duties certainly must be considered as broadening (rather than restricting) the language of Article I, Section 9, Clause 5.

TEXT INTERPRETATION

Constitutional authorities have consistently interpreted Article I, Section 9, Clause 5, as limiting the power of Congress to impose any form of economic burden on exports and, in effect, that the Clause in question constitutes a limitation on the power of taxation as well as the power to regulate foreign commerce.

Mr. Joseph Storey in his "Commentaries on the Constitution of the United States" makes these precise observations:

> "No. 1013 The next clause in the Constitution is: 'No tax or duty shall be laid on articles exported from any State' . . . "
>
> "No. 1014 The obvious object of these provisions is to prevent any possibility of applying the power to lay taxes, *or regulate commerce,* injuriously to the interests of any State, so as to favor or aid another. . . ." (Emphasis added)
>
> ". . . The burden of such a tax would, of course, be very unequally distributed. The power is, therefore, wholly taken away to intermeddle with the subject of exports. . ."
>
> "No. 1015 The first part of the clause was reported in the first draft of the Constitution. But it did not pass without opposition and several attempts were made to amend it, as by inserting after the word 'duty' the words 'for the purpose of revenue,' and by inserting at the end of it 'unless by consent of two-thirds of the legislature,' both of which propositions were negatived. It then passed by a vote of seven States against four.

> Subsequently the remaining parts of the clause were proposed by report of a committee, and they appear to have been adopted without objection. Upon the whole, the wisdom and sound policy of this restriction cannot admit of reasonable doubt; not so much that the powers of the general government were likely to be abused, as that the constitutional prohibition would allay jealousies and confirm confidence. The prohibition extends not only to exports, but to the exporter. Congress can no more rightfully tax one than the other." *Storey, Joseph; Commentaries on the Constitution of the United States,* Boston, Little, Brown and Company 1873, Vol. I, p. 712.

See also *Burdick,* "The Law of the American Constitution" (1922) p. 194, Sec. 81 which analyzes Article I, Section 9, Clause 5 of the Constitution as an explicit constitutional limitation on the power of Congress; and, *Willoughby* on the Constitution, Vol. II p. 694 (2d ed). *Bernard C. Gavit,* Professor of Law at Indiana University in "The Commerce Clause of the United States Constitution" (1932) discusses limitation on the power of Congress to act under the Commerce Clause. He concludes that among the limitations imposed on Congress' power to regulate Commerce under the Commerce Clause are those imposed by Article I, Section 9, Clause 5 of the Constitution (p. 202, Sec. 98).

COURT INTERPRETATION

The Constitutional provision in question has been consistently interpreted to mean that Congress shall not hinder or obstruct the process of exports, and that domestic producers should have access to foreign markets without the imposition of an economic burden

specifically because of their participation in the export market.

The present case is in direct conflict with that policy. Under the Act in question Appellant was required as a condition of participating in the export market, to obtain certificates equivalent to the number of bushels exported. Appellant was required to pay One Hundred Sixty-eight and 52/100ths ($168.52) Dollars to sell his produce abroad.

The power to regulate foreign commerce (Article I, Section 8, Clause 3) is not so broad as to override all other provisions of the Constitution. *Adair vs. United States,* 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1907); *Gibbons vs. Ogden,* 22 U.S. 1, 9 Wheat 1, 6 L. Ed. 23 (1824). One of the limitations imposed on the power to regulate foreign commerce is Article I, Section 9, Clause 5. *Secretary of Agriculture v. Roig Ref. Co.,* 338 U.S. 604, 94 L. Ed. 381, 70 S. Ct. 403 (1950); *Burdick,* "The Law of the American Constitution" (1922) p. 194, sec. 81; *Gavit,* "The Commerce Clause of the American Constitution" (1932) p. 202, sec. 98; *Willoughby,* "On the Constitution" (2 Ed.) Vol. II, p. 694; *Storey* "On the Constitution" (5th Ed.) Vol. I, sec. 1014.

While this precise type of tax or duty has not been placed directly before the Supreme Court, the general prohibition by the Constitution of any interference with the export process, through placement of an economic burden (of whatever size) on either the article exported, the exporter or the process of export has been well (and consistently) voiced by the Court. This

national policy is clearly expressed in *Fairbanks v. United States,* 181 U.S. 283, 45 L. Ed. 862, 21 S. Ct. 648 (1900) where a statute had imposed a charge of ten cents (10c) on any

> "bill of lading . . . for any goods, merchandise, or effects, to be exported from any port or place in the United States to any foreign place . . ."

The Government contended that this did not constitute a tax or duty *on the article exported* and that the scope of the legislation was to impose a duty on a document not the article. The Court struck the Act down as unconstitutional. It stated:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is, 'no tax or duty'. Whether such provision is or is not wise is a question of policy with which the Courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. *It is a restriction* on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a *restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed.* If, for instance, Congress may place a stamp duty of Ten cents (10c) on bills of lading on goods to be exported, it is because it has power to so do; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moments reflection to show that thereby it can effectually place

a burden on exports as though it placed a tax directly upon the Article exported. It can for purposes of revenue, receive just as much as though it placed a duty directly upon the articles, *and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.*"

". . . the question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is, 'no tax or duty.' "

". . . *the purpose of the restriction is that exportation * * * all exportation — shall be free from national burden.* This intent, though obvious from the language of the clause itself, is reinforced by the fact that in the Constitutional convention Mr. Clymer moved to insert after the words 'duty' the words 'for the purpose of revenue,' but the motion was voted down. *So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax on the articles exported, but also a freedom from any tax which directly burdens the exportation; . . .*" (Emphasis added)

The case of *Brown v. Maryland* 12 Wheat 419, 7 U.S. 262, 6 L. Ed. 678, (1837), while relating to Article I, Section 10, Clause 2, is quite closely in point. In that case the State of Maryland required all importers of certain foreign articles to take out a license before they were authorized to sell the imported goods. It was there held that the license, although in the form of a tax on the person for the privilege of

selling was in fact a tax on imports and that the mode of imposing it merely varied the form without varying the substance. Chief Justice Marshall stated:

> "All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. . . . so a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not the right to do, because it is prohibited by the Constitution."

In *Thames & Mersey Marine Insurance Company, Ltd. v. United States* 59 L. Ed. 821, 237 U.S. 19, 35 S. Ct. 496 (1914) the plaintiffs were engaged in writing insurance on merchandise in export in accordance with general export trade custom. The insurance was written as, or shortly after, goods are in actual export. A tax was imposed directly on the insurance policy. The economic impact of an increased cost imposed on the export process merely because it involved an export (as opposed to purely domestic) product led the Court to conclude that the tax violated Article I, Section 9, Clause 5. The Court does not become involved with the issue of revenue or non-revenue or regulatory devices. It holds that the imposition of an *economic burden* on the process of export contravenes the Constitutional mandate.

> *"Is the tax upon such policies so directly and closely related to 'the process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition*:
> ". . . the rise in rates for insurance as immediately affects exporting as an increase in freight

rates, and *the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process.*" (Emphasis added.)

In *United States v. Hvoslef,* 237 U.S. 1, 35 S. Ct. 459, 59 L. Ed. 813 (1916) the Court was dealing with an enactment wherein a stamp tax was imposed directly upon the occupation of operating as a charter party in foreign commerce. The Charter Parties operated exclusively between United States and foreign ports. The tax was struck down as contravening Article I, Section 9, Clause 5 of the Constitution. The Court held that the purpose of this Clause was to prevent obstruction of the export process, not merely to prevent raising revenue from this source.

> "The charters were for the exportation; they related to it exclusively; they served no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports."

The Court then proceeded using language most appropriate to the present case:

> ". . . *This constitutional freedom, however, plainly involves more than mere exemptions from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstruction to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it.* It was the clear intent of the framers of the Constitution that *the process of exporting the products*

> *of a state, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation.* 'Miller, Const. p. 592.' . . ."

In *A. G. Spalding & Bros. v. Edwards* 262 U.S. 66, 67 L. Ed. 865, 43 S. Ct. 485 (1923) the Court held that a tax on

> "All baseball bats . . . balls of all kinds . . . sold by the manufacturer . . ."

was a tax on exports where the manufacturer contracted through a commission merchant. The sole purpose of the transaction was for export and the question to be decided was whether the "sale" was a "step" in export. The tax was on the sale and was held to violate the constitution prohibitions of Article I, Section 9, Clause 5.

> "The very act that passed the title (the sale), and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to the sea does not matter so long as they were only the regular steps toward the contemplated result."

Under the Agricultural Act of 1938, as amended, (7 U.S.C. 1379d (b)) it is provided that:

> "(ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported."

It is thereafter provided that the Commodity Credit Corporation shall allow a refund to the exporter, or a credit against the amount payable for Certificates, in such amount as the Secretary of Agriculture determines will make United States wheat and wheat flour generally competitive in the world market, avoid disruption of world prices and fulfill the international obligations of the United States. The price of each certificate is Twenty-five cents (25c) which sum must be paid by the exporter to participate in the export trade. Without question, as a pure matter of economics, this cost must be passed on, as a part of the purchase price, to the foreign buyer. This can only mean that the foreign buyer pays a price of Twenty-five cents (25c) per bushel (less the current subsidy) in excess of the price receivable by, and quotable to the producer. The complying producer then receives Twenty-five cents (25c) per bushel on Forty-five percent (45%) of his normal production (not his actual production) from the Commodity Credit Corporation as a "bonus" for "cooperating" with the Federal Government. The non-complying producer is wholly deprived of access to the Twenty-five cent (25c), as a "penalty" for "not cooperating" with the Federal Government. The amount of this penalty may vary from day to day depending on the amount of "subsidy" for export established by the Secretary for a particular day under the provisions of Section 1379d (b) previously paraphrased. The cost of the export certificate also may be increased each year.

It is difficult to evaluate whether this is a direct impost on the goods, or upon the exporter. Certainly

it is a circumstance which must be fulfilled as a condition of entering the export market, and thus falls as a direct burden on the "process of exporting," acting as an obstruction as directly as the tax on charter parties in *United States v. Hvoslef,* supra; or as directly as a stamp tax on a bill of lading in *Fairbanks v. United States,* supra; or a tax on the occupation of importing, *Brown v. Maryland,* supra.

CONCLUSION

Appellant urges that the Constitutional and Decisional History, and authoritive interpretation of Article I, Section 9, Clause 5 lead to the unquestionable conclusion that the imposition of *any* "tax or duty" resulting in an economic burden on the process of exporting (whether the article exported or the exporter) is prohibited, whether the "tax or duty" is intended as a revenue or a regulatory measure. As such, Article I, Section 9, Clause 5 is a restriction on the power granted to Congress in Article I, Section 8, Clause 3. The following sections of the Agricultural Adjustment Act of 1964 should be declared unconstitutional, to-wit: 7 U.S.C. 1379c (a) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II Sec. 202 (12-14), 78 Stat. 180, 181); 7 U.S.C. 1379c (C) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II, Sec. 202 (12) - (14), 78 Stat. 180, 181); 7 U.S.C. 1379d (b) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II, Sec. 202 (15) - (17); 78 Stat. 181, 182), insofar as said sections require the purchase of export marketing certificates as a condition of exporting wheat.

The Order granting Appellee's Motion for Summary Judgment (Tr. 81) should be reversed and an Order should be entered granting Appellant's Motion for Summary Judgment and granting Appellant Judgment in the sum of $168.52 and costs.

DATED, Colfax, Washington
July 6, 1966

Respectfully submitted,

WESLEY A. NUXOLL
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WESLEY A. NUXOLL
Attorney for Appellant